Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1974

No. 74-1602

ANTHONY POLITI and HARRY WEIS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 2

Summary of the Facts 2

Reasons For Granting the Writ:

I. The petitioners were placed in double jeopardy by virtue of the prosecution in the case at bar. Their conviction should, therefore, be set aside as violative of the Fifth Amendment of the United States Constitution since they were previously acquitted on similar charges wherein the evidence in a number of important respects was identical to the case at bar. . 5

Conclusion 16

TABLE OF CITATIONS

Cases Cited: *Page*

Abbate v. United States, 1959, 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 ..... 7, 8, 9, 10

Ashe v. Swenson, 397 U.S. 436 (1970) 6, 9, 10, 13, 15, 16

Bartkus v. Illinois, 359 U.S. 121 .....13, 15

Benton v. Maryland, 395 U.S. 784 (1969) 13

Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) 8, 16

Bruton v. United States, 390 U.S. 123 15

Carter v. McClaughry, 183, U.S. 365, 22 S. Ct. 181, 46 L. Ed. 236 (1902) 8

Clawans v. Rives, 104 F.2d 240 (D.C. Cir. 1939) 6

Downum v. United States, 372 U.S. 734, 10 L. Ed. 2d 100 6

Duncan v. Tennessee, 405 U.S. 127, 92 S. Ct. 785, 31 L. Ed. 2d 86 (1972) 11

Ebeling v. Morgan, 237 U.S. 625, 35 S. Ct. 710, 59 L. Ed. 1151 (1915) 8

Contents

Page

Ex parte Nielson, 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889) 8, 16

Gavieres v. United States, 220 U.S. 338, 31 S. Ct. 421, 55 L. Ed. 489 (1911) 8, 13

Green v. United States, 355 U.S. 184 6

Grubb v. Oklahoma, 409 U.S. 1017, 93 S. Ct. 450, 30 L. Ed. 2d 309 (1972) 11

Harris v. Washington, 404 U.S. 55 (1971) 6, 10

Houston v. Moore, 5 Wheat. 1 (1820) 14, 15

Marakar v. United States, 370 U.S. 723, 82 S. Ct. 1573, 8 L. Ed. 2d 803 (1962) 9, 10

Miller v. Oregon, 405 U.S. 1047, 92 S. Ct. 1321, 31 L. Ed. 2d 590 (1972) 11

Morey v. Commonwealth, 108 Mass. 433, (1871) 8, 9, 11

Murphy v. Waterfront Commission, 378 U.S. 52 (1964) 13

People v. Cox, 107 Mich. 435, 65 N.W. 283 7

Petite v. United States, 361 U.S. 529,80 S. Ct. 450, 4 L. Ed. 2d 490 (1960) 9

Contents

	Page
Re Snow 120 U.S. 274 (1887)	7
Robinson v. Neil, 409 U.S. 505, 93 S. Ct. 876, 35 L. Ed. 2d 29 (1973)	9, 10
Simpson v. Florida, 403 U.S. 384, 91 S. Ct. 1801, 29 L. Ed. 2d 549 (1971)	10
United States v. Barzie, 433 F.2d 984 (2nd Cir. 1970), cert. denied, 401 U.S. 975	12
United States v. Cioffi, 487 F.2d 492 (2d Cir. 1973)	10, 11, 12, 13
United States v. De Angelo, 138 F.2d 466 (3rd Cir. 1943)	8
United States v. Ewell, 383 U.S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966)	9
United States v. Jorn, 400 U.S. 479	16
United States v. Kramer, 289 F.2d 909 (2d Cir. 1961)	7, 12
United States v. Mallah, 503 F.2d 971 (2 Cir. 1974)	8
United States v. McCall, 489 F.2d 359 (2d Cir. 1973)	12
United States v. Phillips, 401 F.2d 301 (7th Cir. 1968)	8

Contents

	Page
United States v. Sabella, 272 F.2d 206 (2 Cir. 1959)	11, 13
United States v. Simon, 225 F.2d 260 (3rd Cir. 1955)	8
United States v. Williams, 341 U.S. 70 (1951)	12
Waller v. Florida, 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970)	9
Yates v. United States, 354 U.S. 298 (1957)	12
Yawn v. United States, 244 F.2d 235 (5th Cir. 1957)	8

Statutes Cited:

18 U.S.C.:	
§1084	2
§1245(1)	2
§1952	2
§1955	1, 2, 3
New York Penal Law:	
§225	2
§225.05	2

Contents

	Page
§225.10	2
§225.15	2
§225.35	2
§974	2

United States Constitution Cited:

Fifth Amendment 2, 5, 13, 15

Other Authorities Cited:

American Bar Association Standards, The Prosecution Function and the Defense Function, Sec. 6.1 (Approved Draft, 1971) 43

Note, Twice in Jeopardy, 75 Yale L.J. 264 (1965) 9

Traynor, Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe, 58 Calif. L. Rev. 391 (1970) 9

122 A.L.R. 1436 6

APPENDIX

Order of Affirmance and Decision 1a

Order Denying Rehearing 3a

In The

Supreme Court of the United States

October Term, 1974

No. 74-

ANTHONY POLITI and HARRY WEIS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that this Court grant a writ of certiorari to review orders of the United States Court of Appeals for the Second Circuit rendered the 28 day of April 1975, and also orders denying a rehearing, dated the 20th day of May, 1975, affirming the judgments of the United States District Court for the Southern District of New York, rendered the 14th day of June, 1974, and the 28th day of June, 1974, respectively, convicting them of violating 18 U.S.C. §1955 and a conspiracy to do so (gambling), after trial before Lasker, D.J. without a jury.

OPINION BELOW

The Court rendered a decision which is reproduced as an appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). The orders denying a rehearing were dated the 20th day of May, 1975.

QUESTIONS PRESENTED

1. Whether petitioners were subjected to double jeopardy by virtue of their trial and conviction in the case at bar, in view of the fact that they both were acquitted of a charge in an earlier indictment wherein many facts were similar or identical to the facts herein? (Fifth Amendment, United States Constitution.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution as well as 18 U.S.C. §§1084; 1952; and 1955, are involved herein, and also the New York Penal Law §§ 225.00; 225.05; 225.10; 225.15; 225.35; and 974.

SUMMARY OF THE FACTS

The petitioners herein are two of over fourteen defendants who were indicted for violating Section 1955 of Title 18, United States Code, and a conspiracy to do so.

The petitioners Anthony Politi and Harry Weis, had been indicted on similar charges involving a violation of 18 U.S.C. §1955 under Indictment 71 Cr. 857. That indictment alleged a conspiracy which commenced on March 16, 1971 and terminated on May 24, 1971.

The instant indictment alleges a conspiracy commencing on or about September 1, 1970 and continuing until on or about January of 1973. It is, therefore, obvious that there is a substantial overlap between the two indictments.

In addition to the petitioners, Anthony Politi and Harry Weis, it should be noted that Philip Politi was also indicted under 71 Cr. 857, and Michael Roman and Alphonse Cuzzo were unindicted co-conspirators and accomplices according to a bill of particulars filed by the Government in connection with Indictment 71 Cr. 857.

In addition, Pasquale Maselli was named as a defendant in 71 Cr. 857 and is named as a co-conspirator in the indictment in the case at bar. Thus it is obvious that there are many defendants or co-conspirators who are common to both indictments. The testimony of Acrel Simon and N. Brown concerning meetings with Anthony Politi dating back as far as 1968 and September 1970, revealed how far back the Government was permitted to go, thereby antedating the conspiracy.[1]

While it may be the Government's position that the testimony of Acrel Simon dating back to 1968, was germane to

1. Petitioner's allege error by the Court when it permitted the adduction of evidence long prior to the indictment.

the instant indictment, it is obvious that it far antedates the commencement of the conspiracy. *In fact, the entire period of the conspiracy of Indictment 71 Cr. 857 is embraced within the present indictment.*

If the foregoing facts were the only similarities, it would raise serious double jeopardy questions. But, actually, there are even more cogent reasons for the position taken by petitioners. These include the fact that there was a similarity of evidence in both cases to a significant degree. For example, it is stipulated by Exhibit 27 that twenty-four of the fifty-eight "runner codes" identified in seizures presented in the trial under Indictment 71 Cr. 857 were found among the 175 runner codes identified in the so-called "Bobbin Inn" seizure in this case. Eleven of twenty runner codes found on the tapes seized from defendant Peters and produced in evidence herein, were also adduced in evidence at the earlier trial.

The Trial Court found herein as well that some of the tapes seized at the Bobbin Inn appear to have related to operations in Rockland and Orange Counties, and others to Westchester County.

REASONS FOR GRANTING THE WRIT

I.

The petitioners were placed in double jeopardy by virtue of the prosecution in the case at bar. Their conviction should, therefore, be set aside as violative of the Fifth Amendment of the United States Constitution since they were previously acquitted on similar charges wherein the evidence in a number of important respects was identical to the case at bar.

The Fifth Amendment provides:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

"The constitutional prohibition against 'double jeopardy,'" says the United States Supreme Court, "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." The Court explained:

> "The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though

innocent he may be found guilty." (*Green v. United States*, 355 U.S. 184.)

The Supreme Court of the United States has held that the double jeopardy clause applies not only to state, but federal prosecutions as well (*Ashe v. Swenson*, 397 U.S. 436 (1970)). *Ashe v. Swenson*, moreover, reveals that the doctrine of collateral estoppel is now part and parcel of the double jeopardy prohibition of the United States Constitution. See also, *Harris v. Washington*, 404 U.S. 55 (1971).

This was a non-jury case, but, nonetheless, jeopardy attached as soon as the Court began to hear evidence (*Green v. United States*, 355 U.S. 184 (1957); *Clawans v. Rives*, 104 F.2d 240 (D.C. Cir. 1939); 122 A.L.R. 1436).

The Supreme Court has also condemned harassment of the accused by successive prosecutions. Thus, in *Downum v. United States*, 372 U.S. 734, 10 L. Ed. 2d 100, at 102, 103, the Supreme Court declared:

> "Harassment of an accused by successive prosecutions . . . so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches."

We submit that the evidence herein reveals that there was a continuous crime and that the conspiracies were the same as that embraced in Indictment 71 Cr. 857, thus precluding the trial of Politi and Weis certainly, and perhaps of the co-conspirators who are named in both indictments. The Supreme Court has

stated that there may be but one prosecution for an offense which is continuous in character (see *Re Snow*, 120 U.S. 274 (1887); see also *People v. Cox*, 107 Mich. 435, 65 N.W. 283).

The Second Circuit seems to have ignored its own prior decision in *United States v. Kramer*, 289 F.2d 909 (2 Cir. 1961), where it explained the doctrine and applicability of collateral estoppel. Thus Judge Friendly, writing for that Court, explained quite cogently (*id.* at 915):

> "We see no basis in reason for a limitation so narrow. A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this, even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue. . . .[T]o permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment, 3 Holdsworth, History of English Law, 614, — and still longer before the proliferation of statutory offenses deprived it of so much of its effect. See Mr. Justice Brennan's separate opinion in *Abbate v. United States*, 1959, 359 U.S. 187, 196, 201, 79 S. Ct. 666, 3 L.

Ed. 2d 729. The very nub of collateral estoppel is to extend *res judicata* beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment . . . to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be." *Id.* at 915-916.

"See, *Yawn v. United States,* 244 F.2d 235 (5th Cir. 1957); *United States v. Simon,* 225 F.2d 260 (3rd Cir. 1955); *United States v. De Angelo,* 138 F.2d 466 (3rd Cir. 1943). See also, *United States v. Phillips,* 401 F.2d 301 (7th Cir. 1968)." See *United States v. Mallah,* 503 F.2d 971 (2 Cir. 1974).

Chief Justice Shaw's famous formulation in *Morey v. Commonwealth,* 108 Mass. 433, 434 (1871), quoted with approval in *Ex Parte Nielsen,* 131 U.S. 176, 187-188, 9 S. Ct. 672, 33 L. Ed. 118 (1889); *Carter v. McClaughry,* 183 U.S. 365, 395, 22 S. Ct. 181, 46 L. Ed. 236 (1902); *Gavieres v. United States,* 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911); *Ebeling v. Morgan,* 237 U.S. 625, 630-631, 35 S. Ct. 710, 59 L. Ed. 1151 (1915); and *Blockburger v. United States,* 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), namely, that "the evidence required to support a conviction upon one of them [the

indictments] would have been sufficient to warrant a conviction upon the other," has been somewhat undermined, if not actually overruled.

While the formulation has not been expressly rejected by the Supreme Court of the United States or the circuits, it has been seriously criticized. See the separate opinion of Mr. Justice Brennan in *Abbate v. United States,* 359 U.S. 187, 196, 201, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959); his concurring opinion, joined by Justices Douglas and Marshall, in *Ashe v. Swenson, supra,* 397 U.S. 448, 90 S. Ct. 1189; and Note, Twice in Jeopardy, 75 Yale L.J. 264 (1965). See also Mr. Justice Schaefer's Traynor lecture, Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe, 58 Calif. L. Rev. 391 (1970). No small part of the difficulties in double jeopardy law is traceable to the fact that the same tests have been applied to acquittals and convictions, although the policy considerations relative to reprosecution are quite different.

While the Supreme Court has refrained from employing the *Morey* formulation in such recent cases as *United States v. Ewell,* 383 U.S. 116, 124-25, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966); *Waller v. Florida,* 397 U.S. 387, 390, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970); and *Robinson v. Neil,* 409 U.S. 505, 511, 93 S. Ct. 876, 35 L. Ed. 2d 29 (1973), in at least two cases, *Petite v. United States,* 361 U.S. 529, 80 S. Ct. 450, 4 L. Ed. 2d 490 (1960), and *Marakar v. United States,* 370 U.S. 723, 82 S. Ct. 1573, 8 L. Ed. 2d 803 (1962), the Government has avoided testing the continued validity of the traditional formulation by requesting the dismissal of convictions that might have called for reconsideration of the *Morey* rule. The Government there

insisted that its requests for dismissals were based, not on a violation of double jeopardy principles, but on its own policy "*that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement,*" 361 U.S. at 530, 80 S. Ct. at 451. In both *Petite* and *Marakar*, three Justices would have rejected the Government's "policy of fairness" approach and would have based reversal directly on the Double Jeopardy clause.[2]

As was explained in footnote 5 by the Court in the case of *United States v. Cioffi*, 487 F.2d 492 (2 Cir. 1973) at 497:

> "With the support of Justices Douglas and Marshall, Justice Brennan has continued to hammer away at the Court's reluctance to consider anew what constitutes the 'same offense' for double jeopardy purposes. Sounding a theme that originated with his separate opinion in *Abbate* and *Ashe*, he has pressed for adoption of a constitutional requirement of joinder for all charges arising out of a 'single criminal act, occurrence, episode or transaction," in concurrences, see *Simpson v. Florida*, 403 U.S. 384, 387, 91 S. Ct. 1801, 29 L.Ed.2d 549 (1971); *Harris v. Washington*, 404 U.S. 55, 57, 92 S. Ct. 183, 30 L.Ed.2d 212 (1971); *Robinson v. Neil*, 409 U.S. 505, 511, 93 S. Ct. 876, 35 L.Ed.2d 29 (1973), and in dissents from denials of certiorari,

2. The Government's policy of "if at first you don't succeed, try, try again," is violative of the Fifth Amendment.

> see *Duncan v. Tennessee*, 405 U.S. 127, 130, 92 S. Ct. 785, 31 L.Ed.2d 86 (1972) (writ dismissed as improvidently granted); *Miller v. Oregon*, 405 U.S. 1047, 92 S. Ct. 1321, 31 L.Ed.2d 590 (1972); *Grubb v. Oklahoma*, 409 U.S. 1017-19, 93 S. Ct. 450, 34 L.Ed.2d 309 (1972).

In *United States v. Sabella*, 272 F.2d 206, 211 (2 Cir. 1959), the Court held in essence that the double jeopardy clause prohibited a second prosecution after a conviction stemming from the same narcotics transaction.

The *Sabella* case is further explained in *United States v. Cioffi, supra*, 487 F.2d at 497, 498, where this Court declared:

> "Although this court there reaffirmed the *Morey* doctrine, we refused to extend it to the point of rigid formalism. While the two charged offenses in *Sabella* each technically included one unique element, the Government was not required to prove either in order to make out a *prima facie* case. In effect, then, the same proof could support both convictions. In view of the shadow that has been cast over *Morey*, one is justified in speculating that, unless prosecutors take to heart the recommendations for joinder of all offenses arising out of the same criminal episode or transaction, double jeopardy will be a fertile ground for Supreme Court development in the next decade."

It must be borne in mind further that in the prior indictment herein, namely 71 Cr. 857, there was an acquittal on both counts, namely the conspiracy and the substantive count and, therefore, there was nothing surviving to present to another jury. (See *United States v. Cioffi, supra,* 487 F.2d at 498.)

We recognize if there had been a disagreement on the conspiracy count in the first indictment, then our position herein might be different. (See *United States v. Kramer, supra,* 289 F.2d at 919. See also, *United States v. Williams,* 341 U.S. 70 (1951) and *Yates v. United States,* 354 U.S. 298 (1957)).

We most respectfully submit that the District Judge erred in his ruling that double jeopardy and collateral estoppel did not bar reprosecution. He apparently misinterprets *United States v. Kramer, supra,* and quotes *United States v. Barzie,* 433 F.2d 984 (2 Cir. 1970), *cert. denied,* 401 U.S. 975, which was a one page per curiam opinion, as authority for his position that jeopardy is not present.

In *United States v. McCall,* 489 F.2d 359, 362 (2 Cir. 1973), the Court below interprets *Barzie* as meaning that there were completely separate conspiracies and that the co-conspirators were different.

In the case at bar it is stipulated that many of the same *dramatis personae* are in both indictments and a number of pieces of evidence are common to both indictments. Thus the position taken by Judge Lasker, we maintain is untenable.

His conclusion that there are two distinct and separate conspiracies is not supported by the record which is stipulated to.

Gavieres v. United States, 220 U.S. 339, has been substantially undermined by later cases such as *Ashe v. Swenson, supra,* and *Benton v. Maryland, supra.* (See *United States v. Kramer, United States v. Sabella,* and *United States v. Cioffi, supra.)*

We maintain, however, that *Bartkus* is moribund since *Bartkus* has been specifically overruled by the Supreme Court in *Benton v. Maryland,* 395 U.S. 784 (1969). We urge that the "dual sovereignty" doctrine articulated in *Bartkus* is no longer valid.

Similar reasoning has been rejected in subsequent decisions of the Supreme Court, *e.g. Murphy v. Waterfront Commission,* 378 U.S. 52 (1964). In *Murphy, id.* at p. 68, the Supreme Court held:

> ". . . no support for the conclusion that under the Fifth Amendment, 'the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty.'"

Justification of the *Bartkus* rule on the basis of "federalism" is no longer possible. It is being recognized with increasing frequency that the state and federal governments must cooperate in many areas, that their spheres overlap, and that they have become partners in many ways, especially in the area of law enforcement. This was recognized by the *Murphy* Court, in its discussion of the policies underlying the Fifth Amendment privilege against self-incrimination. The Court there said (pp. 55-56):

> "Most, if not all, of these policies and purposes are defeated when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each. . . . *This has become especially true in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity.*" (Emphasis added.)

We must also bear in mind that since this is a prosecution under the Organized Crime Control Act, that both state and federal offices cooperated in its prosecution. Accordingly, it is surprising that the prosecution or the Trial Court did not consider *Houston v. Moore*, 5 Wheat. 1 (1820), which demonstrates that there is an exception to the dual sovereignty doctrine in any event when two governments are attempting to prosecute a person for the same general act.

Anthony Politi, for example, was also convicted in the state court with respect to his participation in the Bobbin Inn search and seizure incident wherein gambling paraphernalia was found. He was in triple jeopardy!

It would be fatuous to suppose that both the state and federal governments were not jointly seeking convictions in the case at bar.

In *Houston*, the Supreme Court held that "if the jurisdiction of the two courts be concurrent," then the judgment

of either court might be "pleaded in bar of the prosecution before the other" (*id.* p. 31).

Bartkus, it should be noted, recognized the dual sovereignty exception expressed in *Houston* (359 U.S. at 130).

But we emphasize that we do not urge that *Bartkus* is good law since we believe that it is now moribund and the federal prosecution under the former indictment with respect to Anthony Politi and Harry Weis is barred under the Fifth Amendment as well as under the *Houston* case and *Ashe v. Swenson, supra.*

At page 13 of the Trial Court's memorandum and verdict, it is interesting to note that the Court recites the fact that the Government offered to strike from the record certain evidence seized at the Bobbin Inn Motel.

This makes it obvious that the prosecution and the indictment were predicated upon improperly seized evidence and offering to strike this evidence after the trial is over, is completely improper and a violation of due process. Certainly the Court could not redact this from its memory since it is a mental gymnastic which could not easily be performed under any circumstances *(Bruton v. United States*, 390 U.S. 123).

See American Bar Association Standards, The Prosecution Function and the Defense Function, Sec. 6.1 (Approved Draft, 1971).

The United States Supreme Court has given some credence to the "same evidence test" by applying it in other situations

besides *Ashe v. Swenson*. See *Blockburger v. United States*, 284 U.S. 299 (1932).

In the case of in re *Nielsen*, 131 U.S. 176 (1889), the Supreme Court applied a transactional test holding that an initial conviction precluded prosecution for a second crime which required proof of different elements than were required in the first trial. The predicate of the Court's opinion was that the Government was attempting to punish defendant twice for essentially the same illegal conduct.

The fact that there was an acquittal in the first indictment does not disturb the general principle.

Cf. *United States v. Jorn*, 400 U.S. 479.

Thus, we urge that the Court should have dismissed the charges, against Anthony Politi and Harry Weis under the foregoing authorities.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioners

APPENDIX

ORDER OF AFFIRMANCE AND DECISION

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of April one thousand nine hundred and seventy-five.

Present:

HON. TOM C. CLARK
Associate Justice, Retired, United States Supreme Court
HON. LEONARD P. MOORE
HON. WILLIAM H. TIMBERS

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY POLITI, GERALD POLITI, PHILIP POLITI, MICHAEL ROMAN, ROBERT PETERS, ALPHONSE CUZZO, ARTHUR FRANGELLO, LEONARD HARRISON, LAWRENCE JOHNSON, LOUIS VISCONTI, EDDIE WASHINGTON, and HARRY WEIS,

Appellants.

Appendix

74-1917
74-1946

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they thereby are *affirmed* on the opinion of Judge Lasker below. See *Iannelli v. United States*, __U.S.__(1975), 43 U.S.L.W. 4423 (U.S. March 25, 1975).* The mandate shall issue forthwith.

s/ Tom C. Clark
TOM C. CLARK
Associate Justice

s/ Leonard P. Moore
LEONARD P. MOORE
United States Circuit Judge

s/ William H. Timbers
WILLIAM H. TIMBERS
United States Circuit Judge

* Regarding the double jeopardy claim of appellants Anthony Politi and Harry Weis, *United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974), is inapposite since here we are confronted with two completely different and separate gambling operations — one in Westchester County and the other in the Poughkeepsie-Newburgh area.

Appendix

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

Second Circuit

74-1917
A-10

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of May, one thousand nine hundred and seventy-five.

United States of America,

Plaintiff-Appellee,

v.

Anthony Politi, Gerald Politi, Philip Politi, Michael Roman, Robert Peters, Michael Camporeale, Alphonse Cuzzo, Arthur Frangello, Leonard Harrison, Lawrence Johnson, Louis Visconti, Eddie Washington, Harry Weis,

Defendants,

Michael Roman, Leonard Harrison, Lawrence Johnson, Eddie Washington, Louis Visconti, Arthur Frangello, Anthony Politi, Gerald Politi, Philip Politi, Robert Peters, Alphonse Cuzzo, Harry Weis,

Defendants-Appellants.

Appendix

It is hereby ordered that the motion made herein in the alternative by counsel for the appellants Anthony Politi, Harry Weis, Arthur Frangello, dated May 2, 1975 for a stay of the issuance of the mandate and to continue bail for the above named appellants pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is DENIED IN ALL RESPECTS.

It is further ordered that construing the said motion as one to recall the mandate which was issued on April 28, 1975 and to continue bail, the said motion is DENIED IN ALL RESPECTS.

s/ Leonard P. Moore
s/ Tom C. Clark
s/ William H. Timbers

Circuit Judges